

STATE OF ALABAMA
ETHICS COMMISSION



COMMISSIONERS

Camille S. Butrus, Chairman
Helen Shores Lee, Esq., Vice-Chairman
John H. Watson
Lewis G. Odom, Jr., Esq.
Russell Jackson Drake, Esq.

MAILING ADDRESS

P.O. BOX 4840
MONTGOMERY, AL
36103-4840

STREET ADDRESS

RSA UNION
100 NORTH UNION STREET
SUITE 104
MONTGOMERY, AL 36104



James L. Sumner, Jr.
Director

Hugh R. Evans, III
Assistant Director
General Counsel

TELEPHONE (334) 242-2997
FAX (334) 242-0248

June 2, 1999

ADVISORY OPINION NO. 99-23

Patrick H. Tate, P.A.
Attorney at Law
310 Alabama Avenue S.W.
Fort Payne, Alabama 35968-0593

**Use Of Office For Personal Gain/Member Of
City Council Selling Property To An
Industrial Development Board.**

The Industrial Development Board may purchase property from a member of the City Council on behalf of an industrial prospect and, in turn, lease the project back to the industrial prospect, as the purchase price is at or below the fair market value of the property. However, the transaction must be an arms-length transaction and the City Council member may not vote, attempt to influence or otherwise participate in any official action by the Council in connection with the purchase of the property.

Dear Mr. Tate:

The Alabama Ethics Commission is in receipt of your request for an Advisory Opinion of this Commission, and this opinion is issued pursuant to that request.

QUESTIONS PRESENTED

- 1) May the Industrial Development Board purchase property from a member of the City Council on behalf of an industrial prospect and, in turn, lease the project back to the industrial prospect?
- 2) May the Mayor and City Council of the City of Fort Payne ethically install the sewer system and provide the local match to the Ferguson plant site in view of the fact that the property was acquired from a member of the City Council?
- 3) May a Mayor and City Council buy land from a member of that Council at a price equal or below the fair market value of the land that is needed for public purposes?

FACTS AND ANALYSIS

The facts as presented to this Commission are as follows:

Patrick H. Tate serves as the City Attorney of the City of Fort Payne, Alabama, and at the request of the Mayor and members of the Council, he is submitting a request for a formal opinion of the Alabama Ethics Commission regarding a potential conflict of interest that recently presented itself in connection with the location of a potential new industry in the City of Fort Payne, Alabama.

The attorneys who represent the various entities below within the City of Fort Payne and DeKalb County, which may have a stake in this matter, have individually requested that this request be considered as a request on behalf of their particular board or entity.

HISTORY OF THE LAND:

Bill Jordan is a member of the Fort Payne City Council and is a public official as that term is defined by Section 36-25-1(24), Code of Alabama, 1975. Mr. Jordan was elected to the Fort Payne City Council by special election held in March, 1998 and assumed office in April, 1998. Mr. Jordan had previously served as a member of the City Council for two four-year terms with his prior service expiring in October, 1980. For a number of years, Mr. Jordan was president of a company known as Jordan Hatchery, Inc., and in April, 1993 purchased a farm known as the Roebuck Farm which consisted of 130 acres and was contiguous to his hatchery operation. In 1970, the City of Fort Payne constructed a waste water treatment plant on land that is now contiguous to the Jordan Hatchery property and the Roebuck Farm. Neither Jordan

Hatchery or the Roebucks owned their property at the time the waste water treatment plant was built. Simultaneously, when Mr. Jordan purchased the farm, Jordan Hatchery executed and delivered to the Roebucks a mortgage on the property, and a small debt remains outstanding on that mortgage.

In 1994, most of the Jordan Hatchery, Inc. assets were sold to Seaboard Farm, Inc.; however, Bill Jordan retained ownership of the property known as the Roebuck Farm. This transfer took place prior to Jordan's election to the City Council.

HISTORY OF THE PROJECT:

The DeKalb County Economic Development Authority (EDA) was created by local act of the legislature and became operational in the spring of 1994. Jimmy Durham is the executive director of the EDA. Several years ago Durham's office was contacted by a company known as Bird Manufacturing which was looking for property to develop. At that time, Durham contacted Jordan to see if he would sell property that the industry needed. The industry needed 40 acres of property. As Durham relates, in an attached letter, Mr. Bird of Bird Manufacturing toured various sites which were available to new and expanding industries and chose the Jordan site because of its location and development potential; however, this project never materialized and subsequently located in Marshall County. In November, 1998, the Alabama Development Office (ADO) contacted Durham's office and requested to submit a proposal for a project of approximately 40 to 60 acres in size with interstate highway accessibility. Durham's office submitted the Jordan property as well as other properties for consideration. After a site visit by the company, Durham was informed that this company would choose the Jordan site if the area made the selection cut. Durham was later informed that the company would choose a site south of Fort Payne and closer to the Birmingham area. Durham learned this week that the company has selected a site in south St. Clair County.

In January, 1999, Dave Echols, a project manager of ADO, once again contacted Durham's office regarding a project known as EF. Based on the criteria given by ADO, Durham submitted the Stewart-Carden property since it was the only available parcel with rail access.

Six additional parcels were submitted as secondary sites -- the Wilborn property and J.W. Goza parcels, a parcel owned by a Mr. McCurdy and the Jordan parcel.

In January, 1999, a representative of the potential industry came to Fort Payne for a site visit and was accompanied by a representative of the Tennessee Valley Authority (TVA), a representative of the North Alabama Industrial Development Association (NAIDA), and Mr. Echols of ADO. They met with Durham to tour the six sites in Fort Payne and then continued to other sites in Alabama. In his May 7th letter, Durham relates that he did not contact Jordan to get

permission to show the property on this occasion, based on the assumption from their past dealings that the property would still be available. Several weeks later he learned that Fort Payne had made the cut and was the only Alabama city being considered for the location. He also learned that Cleveland, Tennessee; Manchester, Tennessee; and Rome, Georgia were among the finalists for this plant location. He also learned that the Jordan property was the property selected by the site selection team of the industry. At this point, Durham contacted Jordan to see if the property was still for sale so the site selection process could continue. At some point in time, after the initial contact, Durham contacted Jordan to see if he would lower his per-acre price \$500.00 as an inducement to the company to come to the Fort Payne area. Following a favorable response, Durham contacted the company with a per-acre price for the property. At this point, Durham continued to be the only local contact person with the industry; however, he was still unsure of the true identity of the company. Later, engineers from the company surveyed the property and decided that additional acreage would be needed for the project. Additional acreage would be needed because of the flood plain of Willis Creek and the size of the proposed facility. On May 4th, Jordan talked with a representative of the company by telephone at Durham's office to discuss the additional property, and talked by telephone again a few days later to finalize the purchase price of the property and answer questions the company had about the property.

As originally conceived, the new industry, which is now identified as Ferguson Enterprises, would be purchasing 62 acres of land at the sale price of \$8,000 per acre and would be acquiring an additional 15 acres of land at \$4000 per acre. These additional 15 acres lie within the flood plain of Willis Creek and are considered to be of less value than the other 62 acres. In addition, Jordan would be donating 15 acres of land which lie within the flood-way of the creek and is generally considered to be the land that is unusable during winter months and periods of heavy rain because of its close proximity to the creek.

As originally conceived, Jordan would retain ownership of approximately 40 acres of land contiguous to the tract being sold to Ferguson.

Initially, a question arose among various parties as to whether or not the City and various utility boards could participate in this project since the remaining 40 acres owned by Jordan could substantially appreciate in value after the roadway and utilities were installed to the Ferguson site. To resolve that issue and to avoid any potential conflict of interest, Jordan has agreed to sell to the City of Fort Payne the remaining 40 acres of land at the same sale price as the property that is being sold to Ferguson, i.e. \$8000 for 16.6 acres that are in the flood plain. In addition, Jordan would be donating several acres on the eastern boundary of the property to serve as an access road into the site.

Several other city entities will be involved in this development process, and Mr. Tate has attempted to outline the concerns of each of them in the following separate paragraphs.

IDB

1. The Industrial Development Board of the City of Fort Payne is a public corporation organized pursuant to the authority of Article 4 of Chapter 54 of Title 11, Code of Alabama, 1975, as amended. It would be the entity actually purchasing the Ferguson property site from Jordan. Ferguson Enterprises would be furnishing the funds for the Industrial Development Board to purchase the Jordan property. The Industrial Development Board would, in turn, lease the property to Ferguson under a lease of approximately 15 years. In addition, the Industrial Development Board, with the assistance of the County Economic Development Authority would be applying to the State of Alabama for site development funds to assist in the development of this project site to meet Ferguson's needs.

The initial question concerning the ethics act is whether or not the Industrial Development Board may purchase property from a member of the City Council on behalf of an industrial prospect and, in turn, lease the project back to the industrial prospect? As a member of the City Council, Jordan serves as a member of the appointing authority over the members of the Industrial Development Board; however, Jordan was not a member of the City Council, i.e., the appointing authority, at the time the current Board members were appointed to the Industrial Development Board.

WWB

2. The Water Works Board of the City of Fort Payne is a public corporation pursuant to the authority of Article 9 of Title 50 of the Code of Alabama, 1975. The Mayor and City Council of the City of Fort Payne serve as the appointing authority of the Water Works Board. Since Councilman Jordan became a member of the Council in March, 1998, one member of the current Board of Directors has been appointed.

As part of the water requirements, Ferguson Enterprises will require the extension of an 18-inch main to serve its facility. The line size is dictated because of the pressure requirements to provide adequate water pressure for fire protection and to serve the sprinkler system to be installed in the Ferguson facility. At the current time, the primary use of the water on site will be for domestic water purposes, i.e., restrooms, drinking fountains and other customary uses around an office complex. The initial cost estimate of the Water Board's consulting engineer is approximately \$670,500.00 to run the water line to the project site.

The City has applied for and given informal approval for a Community Development Block Grant (ED) and a grant from the Appalachian Regional Commission (ARC) in the amount of approximately \$400,000.00. Based on an agreement with other utilities, the Water Works Board would be receiving approximately \$298,000.00 of that grant. This will require the local

Water Works Board to provide a match of \$329,889.00 from its local funds to accomplish this project. On its face, this appears to be a substantial expenditure of local funds for such a small customer; however, the Water Works Board, for a number of years, has considered the possibility of extending an 18-inch line from its current terminus along an area along Interstate Highway 59 near the proposed Ferguson site to meet the water pressure needs on the south end of Fort Payne and other areas within the Water Board service areas.

The Water Works Board recently voted unanimously to proceed with the project, provided, there is no ethical conflict with the Water Works Board providing this line extension based on the fact that Councilman Jordan currently owns the land.

DC Gas

3. The DeKalb/Cherokee Counties Gas District is a gas district organized pursuant to the authority of Article 12 of Chapter 50 of Title 11 of the Code of Alabama, 1975. It is owned by the municipalities of the City of Fort Payne, City of Centre and the Town of Collinsville. The Gas District serves customers located in portions of five northeast Alabama counties. The Board of Directors of this District is composed of eight directors who are appointed by the members' municipalities based on a formula set forth in the Code, i.e., based on the population of their prospective municipalities. The Mayor and Council of the City of Fort Payne appoint five of the eight directors to this Board of Directors. All of the current directors were appointed to the Board in November of 1996 for a four-year term and Councilman Jordan was not a member of the appointing authority when the current directors were appointed.

The natural gas requirements of Ferguson Enterprises will require that the Gas Board install a four-inch pipe high pressure gas main from the Gas Board's current terminus to approximately 5000 feet to the Ferguson site. The cost of this extension will be approximately \$132,829.00. The Gas District expects to receive a share of \$65,121.00 from the City CDBG (ED) and ARC grants mentioned above, a local match to the Gas District of \$65,021.00. Based on the anticipated revenues from Ferguson, the Gas District would anticipate an annual sale of natural gas to Ferguson of approximately \$11,000 to \$12,000. In essence, the Ferguson site will not be a major consumer of natural gas since their demand will be a seasonal demand; however, based on the reduced amount of the local financial match of the Gas District, the Board of Directors has decided that the project is feasible if the Ethics Commission will issue an opinion stating that: (1) the Gas District may extend line to a project being developed on land currently owned by a member of the City Council; (2) All of the remaining lands which will be served by the new lines will be owned by a public entity, i.e., either the City of Fort Payne or the Industrial Development Board; and (3) Ferguson Enterprises will enter into a contract with the Gas Board for a length of time sufficient to insure that the Gas District's initial investment, i.e., \$65,021.00, is recovered.

FPIA

4. The Fort Payne Improvement Authority is a public corporation organized and pursuant to the authority of Chapter 7 of Title 39 of the Code of Alabama, 1975 and is the municipal power distributor for the City of Fort Payne. The Improvement Authority is governed by five trustees who are appointed by the Mayor and City Council. Since Councilman Jordan has been a member of the City Council, one of the five trustees has been appointed to the Board. During the time that the property currently owned by Councilman Jordan was owned by the Roebucks, the Roebucks, at their own expense, had power lines extended to the property in anticipation of building a home on the property. The management staff of the Improvement Authority has estimated that the cost to extend a three phase power line to the Ferguson plant site would be approximately \$50,000 to \$60,000 and that the revenues generated from the Ferguson project would be approximately \$25,000 per month.

The Improvement Authority staff estimates that the Improvement Authority would recoup its total investment in this project in five years or less.

The only concern of the Board of Trustees of the Improvement Authority is whether or not it may ethically extend these three phase power lines to property that is currently owned by a member of the City Council, i.e., the appointing authority over the Board of Trustees.

Sewer System

5. The City of Fort Payne operates its own sanitary sewer system as a department of city government. The Mayor and City Council provide general oversight authority of the sewer operation. The sanitary sewer system is operated as a branch of the Public Works Department. The Waste Water Treatment Plant facility is also a separate branch within the Public Works Department.

The consulting engineers for the City have estimated that the total cost to extend a sanitary sewer service to the Ferguson site would be approximately \$164,359.00. A \$115,777.00 of this would be paid for, as the sewer system's share of the two grants mentioned in the above paragraphs and the City of Fort Payne would have \$48,582.00 local match on the sewer system.

The ethical question presented to the Mayor and Council on the sewer phase of this project is whether or not the Mayor and City Council of the City of Fort Payne may ethically install this sewer system and provide the local match to the Ferguson plant site in view of the fact that the property was acquired from a member of the City Council?

Access Road

6. In addition to utilities which will be required for this site, an access road will need to be built from the current terminus of the Industrial Park road to the Ferguson site, and the plans currently show the access road to be extended to County Highway 50 which lies approximately 1000 feet south of the Ferguson site. The purpose of the access road connecting into the county highway is to provide two routes of access into the Ferguson site. The estimate of cost to build this road is approximately \$454,000 which will all be paid for by the City of Fort Payne initially. The City hopes to recoup a portion of this cost with an industrial access road grant from the State of Alabama; however, these funds will not be available to assist on the project until after July 1st. The roadway will be built on right-of-way donated by Councilman Jordan, as well as another landowner who owns property south of the Ferguson site.

The ethical issue presented to the Mayor and Council on the road aspect is whether or not it may ethically and legally build an access road to a plant site where the property was acquired from a member of the City Council.

County

7. The DeKalb County Commission is the governing body of DeKalb County, Alabama and by and through its road department has agreed to donate chert and other fill material to be used on the plant site. Councilman Jordan and the DeKalb County Commission do not have any official ties. However, in an abundance of caution, the Commission would inquire as to whether its assistance on this project would violate any provisions of the Code of Ethics since the property is being acquired from another public official who resides within the County.

Land Purchases

8. As stated in the above paragraph, initially Councilman Jordan would have retained ownership of 40 acres of land which could reasonably appreciate in value after the access road and utilities are installed on the Ferguson site.

In order to avoid any ethical conflict and in order to secure a new employer for the community, Jordan has agreed to furnish the City of Fort Payne an appraisal from a qualified appraiser showing the aforementioned sale price equal to or below the fair market value for this property. Jordan has agreed to sell the remaining 40 acres to the City of Fort Payne for \$255,080.00 based on the same sale price the land was sold for the Ferguson site.

The City's consulting engineer has advised that part of the land can be used for the City's waste water treatment facility which is currently being expanded. At the current time, the City of Fort Payne is spending \$11.6 million to upgrade its waste water treatment facility. This will be accomplished in three phases over a period of several years and it is anticipated that in phase three, additional land will be needed to accommodate a waste water treatment facility. Part of the land currently owned by Jordan can be used as part of that expansion.

The issue presented here is whether or not a Mayor and City Council may buy land from a member of that Council at a price equal or below the fair market value of the land that is needed for public purposes?

The City of Fort Payne anticipates that it will construct a small industrial park on the remaining lands and hopes to recoup a portion of the money spent to develop this project by selling the land to other industrial prospects which may arise in the future.

Mr. Tate recently became aware of an opinion issued by the Commission on May 5, 1999 involving the Tallassee Board of Education.

It appears that the proposed purchase of the remaining 40 acre tract of the Jordan property meets the criteria established by the Commission in the Tallassee opinion, in that, it will be purchased at fair market value or less; the transaction will be an arms-length transaction between the City and its City Councilmen; and to the best of the knowledge, information and belief of the, Mayor and remaining Council members, Councilman Jordan has not voted or attempted to influence or otherwise participate in the official action of the City Council regarding the purchase of this remaining property.

Mr. Tate realizes that this letter is lengthy and rather detailed; however, in the interest of full disclosure and of the protection of all parties concerned, he felt it appropriate to explain the details of this project.

Mr. Tate has attached a recent news article which appeared in detail in the Gadsden Times, explaining that Ferguson Company will invest approximately \$23 million dollars in the Fort Payne community to acquire the property and erect a 437,000 square-foot building and employ 135 local workers. Plans also call for an additional expansion of a 402,000 square-foot facility.

Although it is not mentioned in the article, Ferguson has also discussed the possibility of locating a retail outlet in the Fort Payne community which would provide \$50,000.00 a year in sales tax revenues to the City of Fort Payne. The retail project is separate and apart from the distribution project; however, it is anticipated that the retail project would not locate in the area without the distribution center being co-located in Fort Payne.

The Alabama Ethics Law, Section 36-25-5(a), Code of Alabama, 1975, states:

"(a) No public official or public employee shall use or cause to be used his or her official position or office to obtain personal gain for himself or herself, or family member of the public employee or family member of the public official, or any business with which the person is associated unless the use and gain are otherwise specifically authorized by law. Personal gain is achieved when the public official, public employee, or a family member thereof receives, obtains, exerts control over, or otherwise converts to personal use the object constituting such personal gain."

Section 36-25-9(c) states:

"(c) No member of any county or municipal agency, board, or commission shall vote or participate in any matter in which the member or family member of the member has any financial gain or interest."

Section 36-25-1(8) defines a conflict of interests as:

"(8) CONFLICT OF INTEREST. A conflict on the part of a public official or public employee between his or her private interests and the official responsibilities inherent in an office of public trust. A conflict of interest involves any action, inaction, or decision by a public official or public employee in the discharge of his or her official duties which would materially affect his or her financial interest or those of his or her family members or any business with which the person is associated in a manner different from the manner it affects the other members of the class to which he or she belongs."

The threshold question is whether or not a member of the City Council can sell property to the Industrial Development Board for a commercial enterprise to be located in Fort Payne, Alabama.

It appears, from the facts as provided, that Mr. Jordan's property has been on the market for some time and that Ferguson Enterprises approached Mr. Jordan about purchasing the property for the location of their business. It further appears that Mr. Jordan has had no involvement in the negotiations regarding the sale of the property. In addition, Mr. Jordan has agreed to lower his asking price for the property.

The other issue involved in this situation is the sale of the remaining 40 acres of land owned by Mr. Jordan.

It appears that the intent is for Mr. Jordan to sell the property for a price equal to or below the fair market value. Based on Advisory Opinion No. 99-19, this would not violate the Alabama Ethics Law. It also appears that Mr. Jordan's willingness to sell the remaining 40 acres before the property value is significantly increased indicates that he is doing this in the public interest and not for personal gain.


Based on the fact that the threshold question has been answered in the affirmative, the Ethics Commission does not find it necessary to specifically answer or address the other questions or issues involved, as they have been answered by the threshold question.

CONCLUSION

The Industrial Development Board may purchase property from a member of the City Council on behalf of an industrial prospect and, in turn, lease the project back to the industrial prospect, as the purchase price is at or below the fair market value of the property. However, the transaction must be an arms-length transaction and the City Council member may not vote, attempt to influence or otherwise participate in any official action by the Council in connection with the purchase of the property.

AUTHORITY

By 5-0 vote of the Alabama Ethic Commission on June 2, 1999.


Camille S. Butrus
Chair
Alabama Ethics Commission